"We are asked by the intervenor to find as a fact that the seized oil was free from any admixture of tea-seed oil. This we decline to do for the like reason stated.

"The test as conducted before us failed to convince us of the presence of tea-seed oil in the seized oil. This is because we distrust our ability to judge of it.

"The expert opinion testimony to the presence of the tea-seed oil has likewise failed to convince us of the fact because of the opposing testimony of other expert witnesses whose competency and good faith is not questioned.

"It may be objected that this is to apply in a civil case the doctrine of reasonable doubt resorted to in criminal cases. This, in a sense, it is, but what is in doubt is not the fact in dispute but the proofs of it. The distinction attempted may be thus presented. A chemist prepares a mixture of olive oil and tea-seed oil in the proportions of 4 to 1. To this he applies the Fitelson test. He is not seeking to learn whether the mixture contains tea-seed oil because he already knows it does. There is no element of factual doubt in his mind. What is in his mind, after he has completed the test, is the judgment that the test does or does not prove the presence of tea-seed oil. The doubt which enters, if it may be said to be present, is in the mind of the trier of fact after he has listened to conflicting expert opinion testimony. Any fact in question may be said to be in doubt. Here it is the presence of tea-seed oil in the seized product. There may be doubt of its presence but there is no doubt of the other fact that the trier is unconvinced of its presence. Such a discussion partakes too much of the metaphysical to be profitably pursued.

"The point we are endeavoring to make is illustrated by an incident of this trial. Partly to relieve the tedium of the trial but also for the serious purpose of presenting the real nature of the controversy which had been provoked, the question was asked whether the claimant was an 'intervener' or an 'intervenor.' Disputes in orthography or pronunciation are usually settled by an appeal to lexicographers. The correct spelling or pronunciation is determined by authority. When, however, 'doctors differ who shall decide?' So here the question of fact of tea-seed oil or no tea-seed oil, has become wholly submerged in the other question of the merits of the Fitelson test.

"We dispose of it by declining to pass upon it.

"The comment should perhaps be added that in the parlance or terminology of chemists the term 'negative' applied to the result of a test such as one for the presence of tea-seed oil in an olive oil mixture, carries with it the idea of negation as that no tea-seed oil is present. The term is not used in the agnostic sense it conveys to lay minds.

"Being unconvinced of the truth of the averments of the libel, we state the following Findings of Fact and Conclusions of Law.

"Findings of Fact. 1. So far as it is a question of fact, we make the finding that the evidence has left us unconvinced that the seized oil had been adulterated with tea-seed oil.

"Conclusions of Law. 1. In the absence of a finding that the seized oil had been adulterated by the admixture of tea-seed oil, the oil of the seizure was neither adulterated nor misbranded.

"2. The libel should be dismissed."

On April 7, 1937, judgment was entered finding that the product was neither adulterated nor misbranded and it was ordered by the court that the libel be dismissed and the seized oil delivered to the claimant.

PAUL V. McNUTT, *Administrator.*

31077. Adulteration and misbranding of olive oil. U. S. v. 143 Gallon Cans and 95 Quart Cans of Olive Oil. Default decree of condemnation and destruction. (F. & D. No. 37427. Sample No. 67699–B.)
Adulteration and misbranding of olive oil. U. S. v. 8 Gallon Cans, 21 Pint Cans, and 31 Half-Pint Cans of Alleged Olive Oil. Trial by jury. Verdict for Government. Judgment of condemnation. Product ordered sold or destroyed. Product destroyed. (F. & D. No. 37438. Sample No. 62644–B.)

Samples of this product were found to contain tea-seed oil.

On March 26, 1936, the United States attorneys for the Western District of Pennsylvania and the District of Maryland, acting upon reports by the Secretary of Agriculture, filed libels against 143 gallon cans and 95 quart cans of olive oil at Pittsburgh, Pa., and 8 gallon cans, 21 pint cans, and 31 half-pint cans of olive oil at Baltimore, Md., alleging the article had been shipped in interstate commerce on or about October 23 and November 3, 1935, from Brooklyn, N. Y., by the Agash Refining Corporation; and charging that it was adulterated and misbranded.

The article was alleged to be adulterated in that tea-seed oil had been mixed and packed with it so as to reduce or lower its quality or strength and had been substituted in whole or in part for olive oil, which it purported to be.

It was alleged to be misbranded in that the following statements and designs in the labeling were false and misleading when applied to a product which was not pure olive oil but which contained tea-seed oil: "Italian Product Pure Olive Oil Agash * * * Italy," "Prodotti Italiani Olio D' Oliva Puro Marca Agash Italia," "The Olive Oil contained in this can is pressed from fresh picked high grown fruit in Italy. It is * * * guaranteed to be absolutely pure," and "L'olio d'oliva contenuto in questa latta e stato spremuto da olive fresche raccolte in Italia. Especialmente raccomandato per tavola, medicinale ed e garantito assolutamente puro [designs of olive branches and Italian coat of arms with Italian flag]." It was alleged to be misbranded further in that it was offered for sale under the distinctive name of another article, i. e., olive oil.

On May 27, 1939, no claim or answer having been filed in the action instituted in the Western District of Pennsylvania, judgment of condemnation was entered and the product covered by the libel filed in that district was ordered destroyed.

On August 21, 1939, the Agash Refining Corporation, claimant, filed an answer and on October 4, 1939, an amended answer. In the amended answer the claimant denied that the product was adulterated or misbranded as charged in the libel and set forth as a separate and distinct defense that the facts in issue in the case *U. S.* v. *Thirteen 1-Gallon Cans of Olive Oil*, etc. (N. J. No. 31076) were identical with those in the instant case. On October 26, 1939, the Government moved to strike that portion of the amended answer which set up the aforesaid separate and distinct defense on the ground that the issues in the two actions were not identical. This motion was argued and was granted on October 26, 1939.

On November 7, 1939, the case came on for trial before a jury. The trial was concluded on November 13, 1939, and the case was submitted to the jury with the following instructions:

CHESNUT, *Judge*. "Gentlemen of the Jury, now is the proper time to instruct you on the law of the case, and to make some summation of the testimony, as a possible aid to you in reaching your verdict.

"I am sure you know, after some weeks of service, sitting in other cases, that the relative functions of the court and jury in this court are that the judge has to take the responsibility of telling the jury what is the law in the case, but the jury have the sole responsibility to decide the facts of the case for themselves, so that anything that the judge says or seems to imply with regard to the facts is in no way binding on the jury, but you are to decide on the facts yourselves. Anything that I may say to you in reviewing the testimony is purely intended as an aid to you. You can take it or refuse it, as you think wise.

"As to the law of the case, however, I have to take the responsibility for that. It is not a very grave responsibility in this case, because the law is very simple. If you find that this product does contain a substantial quantity of tea-seed oil—and when I say 'substantial,' I will refer to that a little later on—then, of course, you should find for the Government, and against the claimant. If, on the other hand, you find that the product does not contain tea-seed oil, or if you find that your mind is equally poised about that question of fact, as to whether it does or does not, then you should find a verdict for the claimant, because the burden of proof, as we say, is on the Government to satisfy you in this case by the weightier evidence, by the preponderance of evidence—and I will define that a little later—that the cans do contain tea-seed oil.

"Now, while the law is extremely simple, it may be interesting to you to know how it comes to be the law, and why it is we try a case of this kind in this Federal court, and why it is that this particular individual defendant has had his goods seized, and is put, of course, to the trial of the purity of his product and the genuineness of his labels, and the truthfulness of those labels.

"Well, the reason the case is in this court is because it involves interstate commerce. And if you take your minds a little way back to the history of the formation of this Government, you will realize that before our present Constitution, 1787, and after our Revolutionary War, 1776 to 1783, the form of government in the country was what is called the Articles of Confederation.

But that would be a very weak Federal Government. And it was a compact, really, between the States, without any direct power of the central government over the individuals who were citizens of the different States.

"Now, when the Constitution was formed in 1787, which had as one of its purposes the formation of a stronger government than then existed, at the same time there was a great deal of opposition on the part of the States to giving up their particular sovereign powers to the Federal Government. And the result was they compromised, in which certain powers were given to the Federal Government, and certain powers were reserved to the States.

"One of the powers that was given to the Federal Government was the power to regulate interstate commerce: that is to say, trade, and the traffic, and travel from one State to another. You do not have the necessity, therefore, in the United States of America, of a customs regulation, such as now is being advocated as a very desirable thing for some of the countries of Europe. We have no trade barriers between State and State. And one of the most important reasons for the Constitution that we are now living under was the freedom of commerce between the States. And the power to regulate that was given to Congress, so that it should be kept free. And in keeping it free it is reasonable also that it should be kept pure and honest, and that merchants' goods as represented on the labels should be true in fact; and if not, measures should be taken to see that they are kept true. And not only, therefore, has Congress the power to regulate commerce between the States, but it has the power to do it in a way which operates directly from the Federal Government upon the individual.

"Now, that is the background of the Congressional power in this case. That is why the case is in this court, because it raises a Federal question, as distinct from a question of State law.

"Now, the case is brought under what is known as the Pure Food & Drug Act, which was passed by Congress away back in 1906. It was the result of very long public discussion and agitation. There was a great deal of opposition to it. It was felt by many people before it was passed that it could be made to act oppressively upon the reasonably honest, or the wholly honest merchant whose goods might be seized in any part of the country, and he would be put to the burden, of course, of defending the suit, no matter how many seizures were made, and no matter where they were made.

"Nevertheless, Congress passed the law, and one of the features of the law was that goods should not be adulterated, that they should not be cheapened by the putting in of cheaper substitutes for the genuine article, and with respect to the goods inside the container that the labels should fairly apprize people what they are.

"One of the reasons for the passage of the law, of course, had to do very largely with the matter of proprietary medicines, sometimes called patent medicines, which very often, it was said, contained ingredients which were not disclosed by the label, and which were positively injurious. And with regard to foods, of course, it was even more important, because while people may get harmful results from taking drugs which are undisclosed or concealed as the real contents, yet, the number of people who take drugs, compared with the number of people who buy foods, is comparatively small. So it was extremely important to keep food absolutely unadulterated and pure, and that the truth should be told with regard to food products.

"Well, despite the opposition to the passage of the law, on the ground that it was feared it would be too drastic, and might be used oppressively, Congress did, in its judgment and wisdom, in 1906, pass the law. And I do not think it needs any commendation after 30 years or more in practice to realize that it is an extremely beneficial law.

"Of course, any law can be used oppressively; but as long as public officers are responsible to the public for the conduct of their activities, it is not likely that there would be any actual oppression to any considerable extent.

"We, however, have nothing really to do with that in this particular case. And I mention it only to give you the background of the legislation.

"Where we are now, and what the simple law is in this case is, as I say, that if this article is adulterated, or if it is misbranded, then it clearly ought to be condemned by you. And without going into the details of the definition of misbranding, or adulteration, the various phases that they may have, it is simply true in this case that if this article contains tea-seed oil instead of being pure olive oil, then the cans are misbranded, and also the article is adulterated, because it has something in it which is not the pure olive oil.

"So the law is very clear in the case, and the issue of fact is very clear and comparatively simple: that is to say, the ultimate finding of the facts may be difficult to you—I express no opinion about that—but the statement of the question that is submitted to you is a very simple one: Does or does not this olive oil contain tea-seed oil?

"Now, when I said a moment ago a substantial quantity, I think it is technically true that if it has 1 percent of tea-seed oil, it would be adulterated, it would be misbranded. But, practically, in this case, under the evidence, no one is willing to say that a quantity of tea-seed oil less than 8 percent could be detected by anybody, by any kind of a process, by the most scientific tests that could be applied, so that, therefore, as a practical matter in this case, nobody can say that these cans contain tea-seed oil unless there is at least 8 percent of tea-seed oil in them, simply because we have no evidence on which to base any such conclusion.

"Now, what is tea-seed oil? Well, of course, you have heard in the evidence that it is related to the ordinary commercial product so familiar to all of us, tea. But the tea seeds are not exactly the same thing as the tea which you use, and which is used to make a cup of tea. That comes from the leaves and the plant, while the tea seeds are something, I presume, although it was not made perfectly clear in the evidence, preceding the growing of the tea leaves, presumably, I should say tea seeds, the seeds which when planted result in the tea leaves and the ordinary commercial product of tea. But that is not very important of itself, except in an explanatory way, to know what we are dealing with.

"Now, again, it is not legally important in this case whether the tea-seed oil, if there is any in this product, is injurious to health or not. That might be important under one aspect of the law, but it is not important in this case, because here we are dealing with an adulteration which is simply a substance something other than the brand indicates; and there is no charge here by the Government that the substituted article, if it is there, is injurious to health. If it were, of course, the case would be even more important than it otherwise is. But in judging of the fact, I think you can ask yourselves, What is this tea-seed oil?

"Now, when you come to the question of how can you tell from the evidence whether this olive oil has tea-seed oil in it to a substantial amount, over 8 percent—the case is about that—in 1935, when the oil of which these cans were a part was imported from Italy, according to the testimony, there was no known test by which the presence of tea-seed oil in olive oil could be determined. It could not be determined, according to the testimony, by sight, smell, taste, or any of the five senses. Furthermore, according to the evidence, there was no reliable chemical test. Now, therefore, if the importer in this case had suspected in 1935 that these cans contained tea-seed oil, there was no way, so far as the evidence in this case shows, that he could have tested it or determined it.

"Now, again, however, that is not a controlling point in the case, because it is said by the Government that after this oil was imported, and about the time that it was shipped down from New York to Baltimore, and was seized by the Government, that a Government chemist had developed a test which was valuable. And I don't know that the word 'infallible' has been used in regard to it; but it was reliable.

"Now, the question really that you have to decide is whether, from all the evidence you have heard, you are convinced that that test, the Fitelson test, is a reliable test, because there is no other evidence in this case on which you could safely base a verdict of a finding of tea-seed oil in this product unless you are satisfied by your reasoning, and from what you have heard from the evidence, that this Fitelson test is a reliable test.

"The evidence of that, of course, is that it was first developed in 1936, and is the first test which the Government has been able to rely upon. And you have heard the evidence of the extent to which the test has now been accepted by scientific people.

"On the other hand, it is contended that a period of 3 years is not enough to make this test one that can safely generally and always be relied upon. The alleged infirmity in the test has been discussed to you, as contended for by counsel for the claimant here, and by General Woodcock in his concluding speech; and I need not refer to that again specifically.

"Now, it has been argued on behalf of the Government—and I might parenthetically say that both arguments, both for the claimant and for the Government, have been interesting and forceful, and both of them have been designed to appeal to your reason, and it is your reasonable judgment that is invoked here, and you have to reason in this case about the sufficiency of a chemical test, a thing that the average man, of course, is not often called upon to analyze—the Government argues to you that you have the opinion here of four or five very distinguished chemists, and that ought to be enough.

"Well, if you had merely the opinions themselves, that would be one thing. But the evidence has gone further, and the chemists have given you the reasons on which they base their opinions.

"Now, if you had a case of a question of sanity or insanity, and you had a medical doctor, or alienist, as we call the medical experts on insanity, come into court and say that the man is sane or insane, they have to give their reasons for their conclusions, and the jury has to determine whether those reasons appeal to their reason.

"So that I would suggest to you in this case that it is not possible as a stopping point to merely say that four or five distinguished chemists have given you an opinion that this olive oil contains tea-seed oil. They have to give you a reason for that opinion. And you should ask yourselves whether you are satisfied by that reason.

"Now, you can further ask yourselves, What is the reason they assign for the view that tea-seed oil is here? You find it is the Fitelson test. As I followed the testimony, not one of the chemists gave any reason for his opinion except that he had applied the Fitelson test, and that that test showed him, by the test, that there was tea-seed oil here.

"So, therefore, I point out to you that that is how you reason about this matter.

"The ultimate basis for your conclusion must be for or against the sufficiency, in your best judgment, and the reliability of the Fitelson test.

"You have, of course, some little corroborative evidence from Dr. Brice, based on a spectroscopic test. But, as was made plain from his testimony, that was not an affirmative positive test to determine the presence of tea-seed oil, but that it is indicative to him of the presence of something other than pure olive oil.

"But it is not sufficient for the Government in this case, under the pleadings, to show that there is or may be something other than pure olive oil here, because they have specified that the adulterant, the alleged adulterant, is tea-seed oil. So that if we had only Dr. Brice's testimony in the case, interesting as it is, we would not be able to say that that was in itself sufficient to justify a finding that there was tea-seed oil in this substance.

"Now, what is the Fitelson test? I won't go into that in any great elaboration, because you have heard so much about it. It has been very well argued by counsel on both sides.

"In the final analysis, of course, it is what we call a subjective test, rather than an objective test. That is to say, it depends upon the judgment of the man who is testifying about it, as to his appreciation of the range of color that he observes at the time—an evanescent color. He does not bring that color in to show you, except by virtue of tubes of water with certain coloring in them, for the purpose of illustrating what he said he observed. In other words, this is an appreciation through the eye of the distinction between colors, which is relayed to you as his recollection. And that is the thing that you have to appraise.

"Now, nobody in this case, as far as I know, attacks the credibility of the witnesses for the Government who say they got these different color reactions, and judge that the article had tea-seed oil, by virtue of their discrimination and distinction between different colors.

"The way they give it to you is that they say that chemical tests show undoubtedly that if you apply certain chemical substances to seven drops of known pure olive oil, you get, for a 5-minute period during the experiment a color to the solution, which is a very faint pink; and they say that if you do the same thing with known pure tea-seed oil, you get a color reaction which is a definitely deeper pink. Then they say that if you take 80 percent of pure olive oil and add to it 20 percent, or make a solution of 80 percent pure olive oil and 20 percent pure tea-seed oil, you get a color of pink by the experiment which is appreciable to the eye, the normal eye, greater in depth of the color pink than pure olive oil will give, but, of course, nothing like so great as the 100 percent tea-seed oil. And they say that if you make it a 25, or 30, or 40 percent mixture of tea-seed oil and olive oil, you get an even more definite coloration in the gradation of pink.

"Now, with that standard of comparison, they say they performed the experiment with regard to the olive oil, or whatever it is in these cans, and the colors that they got from the experiment they contrasted with their standards of 10, 20, 30, or 40 percent mixtures of tea-seed oil in known olive oil.

"Now, it is their judgment, based on their appreciation of the color pointed out to you by their testimony as witnesses, that you have to rely upon in this case as the evidence on which the Government asks you to say that these cans of olive oil contain a substantial amount of tea-seed oil. And you have to bear in mind, of course, in that connection, that up to 1936 there was no known reliable test for detecting this tea-seed oil.

"Now, you have also, however, some little corroboration and some differentiation that you have to think about. The samples were taken in 1936 from this seizure, and again in 1939, 3 years apart. Well, it might very well be thought by the layman, offhand, that olive oil that has been kept subject to variations in temperature, heat and cold, wet and dry seasons, over a period of 3 years, that there might be some variation in the chemical composition of the contents of the cans. However, the testimony here is that that is not the case where the oil is kept hermetically sealed. And, also, you have the testimony that the analyses by these experiments, according to the witnesses, show, according to them, about the same percentage of tea-seed oil from the 1936 samples as from the 1939 samples.

"Now, I shan't go greatly further into the analysis of the evidence, except to emphasize again to you that the real question here is whether you have been satisfied by all the testimony that you have heard that this Fitelson test is a reliable test, as it is applied to this subject matter.

"The Government has the burden of proof to satisfy you of that fact. And when I say it has the burden of proof, that has not any very technical meaning, but it simply means that unless the Government's witnesses affirmatively show the fact, then the case falls.

"Now, the burden of proof also is dependent upon the preponderance of evidence in a case of this character, which is a civil case and not a criminal case. All the Government has to do is to satisfy you by a preponderance of evidence, by the more weighty evidence.

"And in this case you have very little evidence from the side of the claimant. You have a great deal of argument. And I am sure you have listened to that And I do not mean to suggest at all that the evidence is slight and the argument is great, and, therefore, you should disregard either the evidence or the argument. Sometimes one witness may be just as potent as a dozen. And the burden of proof and the preponderance of the evidence does not depend at all upon the mere quantity and number of witnesses, because you have to take into consideration the quality of their testimony.

"In this case it is perfectly obvious, if you are satisfied, as General Woodcock suggests that you should be, with the opinion of the four or five distinguished chemists, then obviously the weight of the evidence here is with the Government. If, however, in applying your reason you go behind the mere expressed opinion of the experts, and look at the basis for that opinion, and apply that to your judgment as to the sufficiency of the Fitelson test, why, then, after all, you have only practically the one witness for the Government, which is the Fitelson test.

"Now, by laying stress on the ultimate analysis of the test, I do not want to suggest for a moment that there is weakness in the Fitelson test. You heard Dr. Fitelson on the stand. And you are capable of sizing up for yourselves whether he satisfied you that he was a competent man and had devised a test which was reliable in this case. And you can form your own judgment about that, from your familiarity with what he said, and how he expressed himself. You can consider also, undoubtedly, the fact that these other eminent scientists have been willing to express their professional opinion that the Fitelson test is reliable.

"It is, however, true that it has been effective for only 3 years, and that it apparently originated contemporaneously, or about the time of the seizure of these tin cans of olive oil. And you have to look at all the evidence in the case to satisfy yourself, from the standpoint of the Government's evidence, whether you are satisfied that the Fitelson test is reliable.

"Now, you must also consider in this case, in that same connection, the defendant's testimony.

"There are two possibilities there:

"One is that this product has been deliberately and intentionally adulterated and cheapened, for the purpose of making a greater profit.

"The other is the possibility that, consistent with the entire good faith of the claimant in this case, they sold as pure olive oil what they bought as pure olive oil, and if there is tea-seed oil in the product it was put there by the exporter from Italy.

"Now, we have no positive evidence of that one way or the other. But it does not follow because you are satisfied that there is tea-seed oil in these cans that the claimants are necessarily dishonest men, that they have deliberately and intentionally put it there. They tell you very clearly that they did not put it there, that they bought it for pure olive oil, and they sold it as pure olive oil, just as they bought it, without any admixture whatever.

"They describe the nature of their refining plant in New York, and show you how from the original drums in which the olive oil is imported it is taken up into a glass-lined tank, I think, and is there distributed, and after running through a purifier to the bottling works, or wherever it is distributed into the cans, without any adulteration at all, and without ever pouring tea-seed oil into the tank in which the olive oil is contained.

"On the other hand, the testimony does show that these people have been selling another brand, an admixture of tea-seed oil and olive oil. They say they sell it under the brand of San Gennaro, and they do not call it olive oil, and that it consists of a mixture of 15 percent of olive oil and 85 percent tea-seed oil, so that it was entirely physically possible for them to have mixed 40 percent, or 20 percent, or less of tea-seed oil in the olive oil, just as well as it was possible for them to mix 85 percent of tea-seed oil and 15 percent of olive oil, and sell it as San Gennaro oil.

"So that I think you will probably conclude there is nothing in the way of physical impossibility of their having made this mixture, if they deliberately intended to do so. It is not contended that it could have been done accidentally, or was done accidentally.

"You have, therefore, the two alternatives, that on this point of the case they may have been deceived themselves in buying it from abroad, if you find that tea-seed oil is in the product, or they may have deliberately done it for the purpose of cheapening the product, cheapening the cost to themselves.

"Now, on the latter point, as to whether there is any financial motive here for deliberate adulteration, you have the figures which have been given to you, and which have been commented upon by counsel on both sides.

"This Agash Company is apparently, or was back in 1935, doing a substantial business. They had a gross business of $750,000 a year. The utmost saving, according to the calculation of the counsel on both sides, that they would have made by a substitute of 25 percent of tea-seed oil into the olive oil would be only $5,000 a year, which, as compared to $750,000 gross business, is certainly not much. It is about three-fourths of 1 percent. General Woodcock suggests to you that you ought to make a calculation of $5,000 on $75,000. Well, that is a matter that you can consider from both aspects, whichever you think is the more reasonable.

"But I point out to you that the question of whether there was a motive to do it is not the controlling thing in this case. Of course, so far as deliberate adulteration is concerned, obviously, in a trading business, that would be done, ordinarily, at least, for only one motive, and that is to make a greater profit. And unquestionably the passage of the Pure Food and Drug Act had as one of its objectives the stopping of that sort of adulteration for the purpose of cheapening a product and increasing the profits. In this particular case, whether that motive could reasonably be found to have existed from the figures in the case, is a matter for you to determine. I say, however, that it is not necessary for the Government to show that there was a deliberate adulteration. It is sufficient if they have proven to your satisfaction, by a preponderance of the evidence, that the article does contain this tea-seed oil.

"And it is not important on that inquiry whether the tea-seed oil is injurious to health or not. It is important that housewives when buying a can of pure olive oil should get what they are buying. And if they are not getting what they are buying, it does not matter whether it is by the misfortune, or the innocent mistake, or by the wilful and intentional and deliberate action of the person who sells it to them.

"The man who puts out an article and calls it pure olive oil, takes the risk of the correctness of the statements that he has made. And if he has made a mistake, either innocently or otherwise, he subjects his product to seizure and condemnation by the Government.

"The Pure Food and Drug Law, gentlemen, the Act of 1906, which we are dealing with here, has been recently amended and somewhat extended by the Act of 1938, of which you may have seen a discussion in the papers from time to time. But we are dealing with the former act, and not the latter act, because this seizure was made back in 1936, before the 1938 act was passed.

"Now, I think I have about covered the subject, so far as I recall.

"This olive oil business, as we have said, is 10 percent or less of the total business of the Agash Company.

"Is there anything else that counsel would like me to comment on, or any exceptions? Do you want to take any exceptions, or do you want the jury to retire?"

Mr. SOBELOFF. "We are content with the court's charge, your Honor."

Mr. WOODCOCK. "I have no suggestions, your Honor."

The COURT. "Very well."

"Gentlemen of the Jury, the form of your verdict, when you have arrived at it, will be this: If you find for the Government, you will simply say you find for the Government. If, on the other hand, you find for the claimant, you will say that you find for the claimant. Putting it in another way, if you find that these cans contain tea-seed oil, then you should find for the Government. If you find that they do not contain tea-seed oil, or if you are not satisfied by a preponderance of the evidence that they contain tea-seed oil, then you should find for the claimant.

"The preponderance of the evidence, I think I have explained to you. It does not mean that the jury should be equally divided on the question. That is not preponderance at all. I know of a case once in which the expression 'the preponderance of evidence' was expressed in this way: if the minds of the jury are in equipoise about the fact, then they should find for the defendant. And that was understood by the jury to mean that if they stood six to six upon the issue, they should find for the defendant. Of course, that is all wrong. It is an individual problem of the judgment of each one of you. And when we speak of the preponderance of evidence we mean whether each one of you has a conviction, after having heard all the evidence, that the weight of the evidence supports one view or the other view. But the burden in this case is on the Government to show that it has the weight of evidence on its side.

On November 13, 1939, the jury returned a verdict for the Government and on November 23, 1939, judgment of condemnation was entered and it was ordered that the product be sold by the United States marshal as a mixture of olive oil and tea-seed oil and that the purchaser be required to remove the oil from its present containers, and to label such product, if for resale, as a mixture of olive oil and tea-seed oil. The decree provided further that upon failure to effect such sale the product be destroyed. No sale was made and the product was destroyed.

PAUL V. MCNUTT, *Administrator*.

31078. Adulteration of canned mackerel. U. S. v. 521 Cases of Canned Mackerel (and 4 other seizure actions involving canned mackerel). Decree of condemnation. Portion of product released under bond. Remainder ordered destroyed. (F. & D. No. 44048. Sample No. 33987–D.)

This product was found to be in part decomposed.

Between October 1 and October 7, 1938, the United States attorney for the Eastern District of Virginia, acting upon reports by the Secretary of Agriculture, filed libels against 636 cases of canned mackerel in various lots at Norfolk, Emporia, Suffolk, and Miles Store, Va., alleging that the article had been shipped in interstate commerce on or about August 31, 1938, by the Southern California Fish Corporation from Terminal Island, Calif.; and charging that it was adulterated in violation of the Food and Drugs Act. The article was labeled in part: "Sunset Brand California Mackerel."